

**U.S. Department of Labor**

Office of Administrative Law Judges  
Seven Parkway Center - Room 290  
Pittsburgh, PA 15220

(412) 644-5754  
(412) 644-5005 (FAX)



**Issue Date: 18 August 2006**

CASE NO.: 2005-BLA-5822

In the Matter of:

V.G.

Claimant and Survivor of

R.G.

Miner

v.

G M & W COAL CO., INC.

Employer

and

STATE WORKERS' INURANCE FUND

Carrier

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS

Party in Interest

APPEARANCES:

Heath Long, Esq.

For the Claimant

James M. Poerio, Esq.

For the Employer/Carrier

Before: DANIEL L. LELAND

Administrative Law Judge

**DECISION AND ORDER — AWARDING BENEFITS**

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was

referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Pittsburgh, Pennsylvania on March 29, 2006 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-33, claimant's exhibits (CX) 1-4, and employer's exhibits (EX) 1-4 were admitted into evidence. Post hearing evidence consists of CX 5- the deposition of Dr. Begley, CX 6- the deposition of Dr. Perper, EX 5, the Decision and Order of Judge Richard A. Morgan in the living miner's claim, and EX 6, the deposition of Dr. Oesterling. Claimant previously submitted the medical reports of Dr. Perper (DX 12) and Dr. Pickerill (DX 13). Dr. Perper's report is based primarily on his review of the medical evidence in this case and on his review of the biopsy slides to only a minimal extent, and it therefore can not be considered a biopsy report. As claimant is permitted to submit no more than two affirmative medical reports as part of its affirmative case, the report of Dr. Begley (CX 2), the curriculum vitae of Dr. Begley (CX 3), and Dr. Begley's deposition (CX 5) will be excluded from the record. See §§ 725.414(a)(2)(i), 725.456(b)(1). By order dated June 9, 2006 the parties were allowed to submit briefs by July 31, 2006. Neither party has filed a brief.

### ISSUES

- I. Existence of pneumoconiosis.
- II. Causal relationship of pneumoconiosis and coal mine employment.
- III. Causation of death.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>

#### Procedural History

RG (the miner) filed a claim for benefits on June 11, 1998 that was denied by the district director and heard by Judge Morgan on January 25, 2000. In a Decision and Order issued on June 12, 2000 Judge Morgan found that the evidence established the existence of pneumoconiosis but failed to prove that the miner was totally disabled. (DX 1, EX 5). Claimant filed a claim for survivor's benefits on March 5, 2004. (DX 2). The district director awarded benefits on December 3, 2004, the employer requested a hearing, and the case was referred to the Office of Administrative Law Judges on April 26, 2005. (DX 25, DX 27, DX 31).

---

<sup>1</sup> The following abbreviations have been used in this opinion: DX=Director's exhibit, CX=claimant's exhibit, EX=employer's exhibit, TR=transcript of hearing.

### Background

The miner was born on February 10, 1938 and died on December 25, 2001. (DX 2, DX 11). The parties have stipulated that he was employed as a coal miner for 14.75 years. (TR 6). See DX 6, DX 7. Claimant testified that the miner was short of breath when walking. (TR 17). He was diagnosed with lung cancer. (TR 19). Dr. Pickerill was his treating pulmonologist. (*Id.*). Claimant testified that the miner did not smoke every day; he bummed cigarettes but never bought them. (TR 20). He smoked a pipe for as long as claimant knew him but he did not keep it lit. (TR 21). He was called a “pretty boy smoker”. (*Id.*).

### Medical Evidence

The records of the miner’s treatment for lung cancer at the University of Pittsburgh Cancer Center and Conemaugh Memorial Medical Center are at CX 1. A pathology report of June 16, 2001 states that the right pleura shows dense fibrous tissue embedded with small nests of carcinoma, consistent with involvement by pulmonary adenocarcinoma. (EX 3). A cytopathology report of June 18, 2001 indicates that the miner’s right pleural fluid shows atypical cells and that a neoplasm can not be excluded. (EX 4). Dr. Samuel Yousem interpreted a pathology specimen from the right lower lobe of the lung on June 19, 2001 as showing poorly differentiated adenocarcinoma. (CX 1).

The miner’s death certificate gives the cause of death as acute/chronic respiratory failure due to advanced stage IV lung cancer and congestive heart disease. (DX 11).

In his report of July 12, 2003, Dr. Joshua Perper, a pathologist, reviewed a large amount of medical data relevant to the miner including slides from several biopsies. (DX 12.<sup>2</sup>) Dr. Perper concluded that the miner had coal workers’ pneumoconiosis based on his fourteen years of coal mine employment, his pulmonary symptomatology, the diagnosis of chronic obstructive pulmonary disease, several positive chest x-rays, various clinicians’ diagnoses of pneumoconiosis, and the miner’s cessation of smoking in 1995. Dr. Perper also stated that the miner’s coal dust exposure caused his centrilobular emphysema and his lung cancer. He opined that the miner died of respiratory failure secondary to a combination of coal workers’ pneumoconiosis and associated lung cancer and chronic obstructive lung disease on the background of severe arteriosclerotic heart disease. Coal worker’s pneumoconiosis was a substantially contributing cause of death both directly and indirectly thorough causally associated lung cancer and chronic obstructive pulmonary disease, Dr. Perper averred.

Dr. Robert Pickerill reviewed Dr. Perper’s report and his own extensive medical records regarding the miner. In a June 7, 2004 report (DX 13), Dr. Pickerill stated that he last examined the miner on June 11- June 13, 2001 when he was admitted to Conemaugh Memorial Medical Center for complications of bronchogenic carcinoma of the right lung. Based on his previous evaluation of the miner and his review of the miner’s medical records, Dr. Pickerill determined

---

<sup>2</sup> In a November 18, 1999 report appended to his deposition, Dr. Perper reviewed the slide of a lung biopsy of April 18, 1999. Dr. Perper diagnosed coal workers’ pneumoconiosis with macules, partial pneumconiotic nodules, silica crystals and interstitial fibrosis, chronic bronchitis, sclerosis of small intra-pulmonary blood vessels, but no evidence of cancer.

that the miner had pneumoconiosis as a result of coal dust exposure, that his death was due to extensive bronchogenic adenocarcinoma and its related complications, and that his bronchogenic carcinoma was most likely due to a scar carcinoma related to pulmonary fibrosis, which he attributed to pneumoconiosis. Dr. Pickerill therefore concluded that the miner's lung cancer was related to his coal mine dust exposure and that his death was causally related to pneumoconiosis and coal mine dust exposure.

Dr. Everett Oesterling, a pathologist, reviewed the slides from several of the miner's lung biopsies. (EX 2). Dr. Oesterling concluded that the slides show anthracotic pigmentation but did not warrant a diagnosis of coal workers' pneumoconiosis. He also diagnosed adenocarcinoma of the lung, but he did not agree with Dr. Perper that the lung cancer was caused by coal dust exposure. Coal mine dust exposure was not a factor in the miner's death, Dr. Oesterling concluded.

The employer has introduced into evidence the May 10, 2000 deposition of Dr. Gregory Fino, which was part of the evidence in the living miner's claim. (EX 1). Dr. Fino examined the miner on November 12, 1998 and recorded a cigarette smoking history of one pack a week for thirty years stopping in 1986 and pipe smoking for thirty eight years from 1956 to 1984. (*Id.* at 10). Dr. Fino noted that the miner had worked as an underground coal miner for fifteen years. (*Id.*). The miner had a significant history of heart disease including two heart attacks. (*Id.* at 11). The physical examination was unremarkable, the pulmonary function studies were invalid and repeat pulmonary function studies did not show an inability to do his last coal mine job. (*Id.* at 13). The chest x-ray was negative for coal workers' pneumoconiosis. (*Id.* at 13-14). The blood gas test was normal. (*Id.* at 14). Dr. Fino stated that the miner did not have a coal mine dust related pulmonary condition. (*Id.* at 15). Dr. Fino did not review the CT films or the biopsy slides. (*Id.* at 19-20). He stated that the biopsy contained insufficient material to rule in or rule out coal workers' pneumoconiosis. (*Id.* at 24).

Dr. Pickerill testified that he became the miner's treating pulmonologist on October 20, 1998 and treated him for the next several years. (CX 4 at 7). In the initial evaluation, the miner's pulmonary function studies showed a moderately severe obstructive defect and his chest x-rays were abnormal. (*Id.* at 8). Dr. Pickerill referred the miner for a CT scan and performed a bronchoscopy which showed evidence of pneumoconiosis. (*Id.* at 8-9). Dr. Pickerill examined the miner on April 17, 2000 and his pulmonary function studies had improved but still showed COPD and the x-ray was still abnormal. (*Id.* at 9). A repeat bronchoscopy in 2001 demonstrated cancer. (*Id.* at 10). The type of cancer was adenocarcinoma which can be associated with scar cancer. (*Id.*). The miner had a minimal cigarette smoking history, only one pack a week for ten years, and a pipe smoking history that was hard to quantify. (*Id.* at 12). Dr. Pickerill believed that the fibrosis in the miner's lungs caused by exposure to coal dust made a significant contribution to his lung cancer. (*Id.* at 12-13). In June 2001 Dr. Pickerill referred the miner to Dr. Awan, an oncologist in Pittsburgh, for chemotherapy and surgery. (*Id.* at 13). The miner's coal dust exposure was a significant contributing factor to the development of his cancer and his death from respiratory failure, Dr. Pickerill opined. (*Id.* at 14).

Dr. Perper was deposed on May 22, 2006. (CX 6). He testified that the cancer developed in the scar of coal workers' pneumoconiosis. (*Id.* at 29, 31-32). Silica is a carcinogenic

substance. (*Id.* at 29, 32-34). The miner had non small cell cancer consistent with adenocarcinoma. (*Id.* at 30). Adenocarcinoma is the type of cancer which develops in a scar. (*Id.*). The contribution of the miner's smoking to the development of cancer cannot be excluded. (*Id.* at 30, 34). His death was due to respiratory failure secondary to a combination of coal worker's pneumoconiosis with associated cancer and chronic obstructive lung disease on the background of severe atherosclerotic heart disease. (*Id.* at 34). The miner's coal dust exposure was a significant contributing cause of death. (*Id.*).

Dr. Oesterling testified in his deposition (EX 6) that the biopsy slides showed adenocarcinoma and anthracotic pigmentation but not coal workers' pneumoconiosis. (*Id.* at 15-17). Almost all bronchogenic cancers are related to cigarette smoking. (*Id.* at 22). Dr. Oesterling assumed that the miner's lung cancer is related primarily to his inhalation of tobacco smoke. (*Id.* at 25). Medical studies show no increased incidence of lung cancer in coal miners. (*Id.* at 26). The miner's exposure to coal dust and silica did not cause or contribute to the development of his lung cancer. (*Id.* at 33). The miner died due to metastatic carcinoma of the lung. (*Id.*). Dr. Oesterling admitted that the miner's smoking history was not significant and he suspected that it would not lead to lung cancer. (*Id.* at 41).

### Conclusions of Law

Benefits are provided to eligible survivors of a miner whose death is due to pneumoconiosis. § 718.205(a). The existence of pneumoconiosis may be established by chest x-rays, autopsy or biopsy evidence, the presumptions in §§ 718.304, 718.305, and 718.306, and medical opinions finding that the miner has pneumoconiosis as defined in § 718.201.<sup>3</sup> See § 718.202(a)(1)-(4). All types of medical evidence must be weighed in determining whether the miner had pneumoconiosis. See *Penn Allegheny Coal Co. v. Williams*, 114 F. 3d 22 (3d Cir. 1997). In claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis (1) where the miner's death was due to pneumoconiosis, or (2) where pneumoconiosis was a substantially contributing cause of the miner's death or death was caused by complications of pneumoconiosis, or (3) where the presumption in § 718.304 is applicable. § 718.205(c). Pneumoconiosis is a substantially contributing cause of death if it hastened the miner's death. See § 718.205(c)(5), *Lukosevicz v. Director, OWCP*, 888 F.2d 1001 (3d Cir. 1989).

There are no chest x-ray readings in the survivor's claim. The biopsy reports from 1999 and 2001 diagnose adenocarcinoma and do not mention coal workers' pneumoconiosis. However, it is not clear whether the pathologists originally reviewing the biopsy slides were aware of the miner's occupational history, and therefore I do not place great weight on their failure to diagnose pneumoconiosis. Dr. Perper concluded that the biopsy slides show coal workers pneumoconiosis, but Dr. Oesterling stated that the slides show only anthracotic pigmentation and do not support a diagnosis of coal workers' pneumoconiosis. The enumerated presumptions are not applicable to this claim.

---

<sup>3</sup> Section 718.201 defines pneumoconiosis as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. The definition of pneumoconiosis includes clinical, or "statutory," pneumoconiosis, and medical, or "legal", pneumoconiosis.

Dr. Fino concluded that the miner did not have a coal dust related pulmonary condition, but he examined the miner on only one occasion which was three years before his death. He was not aware of the biopsy reports of 2001 or of almost all the other medical evidence generated after his examination. Dr. Fino's opinion that the miner did not have pneumoconiosis is too remote and outdated to be accorded any weight. In contrast, Dr. Pickerill saw the miner from October 1998 for the next several years and was aware of the 2001 biopsy reports as well as more recent medical data. Dr. Pickerill based his diagnosis of coal workers' pneumoconiosis on chest x-rays, CT scans, pulmonary function studies, and biopsy reports. As the miner's treating pulmonologist for three years, I believe that the opinion of Dr. Pickerill is entitled to greater weight than the opinion of Dr. Fino. See § 718.104(d).

After weighing the evidence, I conclude that the miner had pneumoconiosis. As the miner had at least ten years of coal mine employment it is presumed that his pneumoconiosis arose out of his coal mine employment. See § 718.203(b). I find that this presumption has not been rebutted by the evidence of record.

Dr. Pickerill and Dr. Perper determined that the miner died due to lung cancer which developed as a result of fibrosis caused by his exposure to coal mine dust. Dr. Oesterling also attributed the miner's death to lung cancer but he believed that the cancer was due to smoking. As Dr. Oesterling did not diagnose coal workers' pneumoconiosis, his conclusion that pneumoconiosis did not contribute to the miner's death is entitled to little weight. *Soubik v. Director, OWCP*, 366 F. 3d 226 (3d Cir. 2004). Moreover, Dr. Oesterling testified that he assumed that the miner's lung cancer was caused by cigarette smoking. When informed of the miner's minimal smoking history, however, he agreed that it was unlikely to have caused the miner's lung cancer. The opinions of Drs. Pickerill and Perper are based on an accurate smoking history, but the opinion of Dr. Oesterling relied on the assumption that the miner was a much heavier smoker than he was. Dr. Pickerill's opinion is also entitled to considerable weight because he treated the miner's pulmonary condition from October 1998 to June 2001. § 718.104(d). I accord great weight to the credible opinions of Dr. Pickerill and Dr. Perper, and I find that pneumoconiosis was a substantially contributing cause of the miner's death.

Claimant has satisfied all the elements of entitlement. Benefits will be awarded as of December 1, 2001, the first day of the month in which the miner died. § 725.503(c). Claimant's counsel has thirty days to file a fully supported fee application and his attention is directed to §§ 725.365 and 725.366. Employer's counsel has twenty days to respond with objections.

### ORDER

IT IS ORDERED THAT G M & W Coal Co., Inc. and the State Workers' Insurance Fund:

1. Pay claimant all the benefits to which she is entitled beginning as of December 1, 2001,

2. Reimburse the Black Lung Disability Trust Fund for interim payments made to claimant, and
3. Pay interest to the Black Lung Disability Trust Fund on the unpaid benefits from the date of the initial determination of liability by the district director.

A

DANIEL L. LELAND  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

**Notice of public hearing:** By statute and regulation, black lung hearings are open to the public. 30 U.S.C. § 932(a)(incorporating 33 U.S.C. § 923(b)); 20 C.F.R. § 725.464. Under e-FOIA, final agency decisions are required to be made available via telecommunications, which under current technology is accomplished by posting on an agency web site. *See* 5 U.S.C. § 552(a)(2)(E). *See also* Privacy Act of 1974; Publication of Routine Uses, 67 Fed. Reg. 16815 (2002) (DOL/OALJ-2). It is the policy of the Department of Labor to avoid use of the Claimant's name in case-related documents that are posted to a Department of Labor web site. Thus, the final ALJ decision will be referenced by the Claimant's initials in the caption and only refer to the Claimant by the term "Claimant" in the body of the decision. If an appeal is taken to the Benefits Review Board, it will follow the same policy. This policy does not mean that the Claimant's name or the fact that the Claimant has a case pending before an ALJ is a secret.

